HUBACHER & AMES, PLLC

September 6, 2018

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex parte* notice in *Accelerating Broadband Deployment*, GN Docket No. 17-83; *Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91; *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142.

Dear Ms. Dortch:

On September 6, 2018, the Building Owners and Managers Association (BOMA) International filed the attached letter in the above-listed dockets. Copies of the letter were also sent by email to the following members of the Commission's staff: Matthew Berry, Paul D'Ari, Jay Schwarz, Amy Bender, Jamie Susskind, and Travis Litman.

Please let me know if you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

HUBACHER & AMES, P.L.L.C.

Matthew C. Ames

REAL ESTATE - TELECOMMUNICATIONS COUNSEL

ARTHUR S. HUBACHER
MATTHEW C. AMES

11350 RANDOM HILLS ROAD
SUITE 800
FAIRFAX, VA 22030

TELEPHONE
703 279-6526

FACSIMILE
703 279-6536

EMAIL
mames@hubacherames.com

1101 15th Street NW, Suite 800
Washington, DC 20005
Office: 202-326-6300
Fax: 202-326-6377
www.boma.org

September 6, 2018

The Honorable Ajit Pai
Chairman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Ms. Elizabeth Bowles
Chair
Broadband Deployment Advisory Committee
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142.

Dear Chairman Pai and Chair Bowles:

The Building Owners and Managers Association (BOMA) International is a federation of 88 BOMA U.S. associations and 18 international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types including nearly 10.5 billion square feet of U.S. office space that supports 1.7 million jobs and contributes $234.9 billion to the U.S. GDP. Its mission is to advance a vibrant commercial real estate industry through advocacy, influence and knowledge. In years past, we have participated in various proceedings before the Federal Communications Commission (the "FCC") pertaining to access to and use of private property by communication providers.[1] Today, we write to support the comments of the National Multifamily Housing Council ("NMHC") and the National Apartment Association ("NAA") concerning the Model State Code ("MSC") now being

[1] For example, BOMA was an active member of the Real Access Alliance when the FCC examined comprehensively the issue of competition inside commercial buildings in *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket 99-217, Report and Order, 23 FCC Rcd 5385, 2008 FCC LEXIS 2503, 44 Comm. Reg. (P & F) 936 (F.C.C. March 21, 2008).

considered by the Broadband Deployment Advisory Committee ("BDAC").

Like NMHC and NAA, we welcome the FCC's focus on broadband deployment and appreciate the work the BDAC has done to identify regulatory barriers to infrastructure investment. We know that broadband deployment is a vital issue, because the owners and managers of commercial real estate across the nation work to advance deployment every day. Bringing a local incumbent carrier into a new construction project, enhancing access to wireless broadband by hiring a consultant to build a distributed antenna system ("DAS"), or meeting a tenant's request for broadband service from a competitive fiber provider, are all part of a day's work in our industry.

Consequently, Article 8 of the MSC raises similar, serious concerns for us as it does for NMHC and NAA. Even though the existing marketplace is operating efficiently, Article 8 would grant all providers of communications services the right to access and install facilities in private office buildings and every other type of commercial property.[2] Article 8 would also mandate construction of broadband facilities in new and renovated buildings at the property owner's expense. We share all of the practical and legal concerns already raised by NMHC and NAA, including:

- Article 8 exceeds the BDAC's charge from the FCC, because rather than remove or reduce regulatory barriers, it would regulate or even replace contracts freely negotiated between property owners and broadband service providers.
- The real estate industry is unrepresented on the BDAC, which means that this substantial matter has been considered without the benefit of a critical stakeholder perspective.
- The widespread enactment of Article 8 by the states would create a vast, new, implicit subsidy mechanism, under which the states would shift significant network construction costs from providers to property owners. Not only is this fundamentally

[2] Certain providers urged the FCC to adopt essentially the same scheme in service of their business plans nearly twenty years ago. The FCC examined those proposals in great detail in *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket 99-217, First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2000). The record in that proceeding made it very clear that building owners were not impeding competition to any significant degree. In the course of that proceeding, the Real Access Alliance, of which BOMA was a member, adopted and promoted a model license agreement for use by owners in granting access to all types of providers. In the end, the FCC went no further than barring providers from entering into exclusive contracts with commercial building owners.

unfair, but it is contrary to the universal service reform of the Telecommunications Act of 1996, which eliminated implicit subsidies of providers.[3]

- The states lack the authority to promote competition for what are fundamentally interstate services in a manner so remote from what Congress anticipated in adopting 47 U.S.C. § 1209. Furthermore, in enacting 47 U.S.C. § 259, Congress has already given the Commission the authority to require infrastructure sharing among providers.
- Although the MSC appears to circumvent the limits on the Commission's authority over property owners by handing the issue off to the states, the Takings Clause of the Fifth Amendment still restricts the power of the states to grant third parties the right to occupy private property.
- Article 8 would replace a functioning market-based system with a multiplicity of new state regulatory regimes, in turn creating considerable practical and economic inefficiency as well as legal uncertainty.
- Forcing an owner to install equipment without an agreement from a provider to serve the building is fundamentally unfair and economically inefficient.
- Article 8 is based on an incorrect assumption, without any evidence in the record or any opportunity for property owners to address the specific claims of its proponents, that commercial property owners forestall competition.

The commercial real estate industry has a long history of promoting the growth of communications services. American businesses – our members' tenants – are high-volume users of the advanced communications and information technology services made possible by broadband networks. Our tenants' businesses rely on these services to thrive and grow, and we in turn rely on our tenants' success for our business to succeed.

Additionally, the commercial real estate industry is highly competitive. Offering amenities that a tenant wants is paramount to securing a lease that will keep our office buildings full and financially healthy. Office building tenants, just like apartment building tenants, often feel loyal to their telecommunications providers and being able to let them choose or bring their own provider is a competitive advantage for a building.

Article 8 is entirely unnecessary because commercial property owners understand their customers' needs and do as much as possible to meet them. When it comes to building access, other issues may come into play, under extenuating circumstances. Both riser space in older buildings as well as space in MPOE (telecommunications) rooms must be taken into account. These areas of a building are often small, built without our modern considerations and not alterable unless the building is being completely redeveloped. Often these small rooms are

[3] 47 U.S.C. § 254 addresses universal service. To the extent that the Commission's goal is to extend service into buildings, that is the source of the Commission's authority.

already filled with old cable and equipment that providers have failed to remove. Perhaps a provider has previously failed to properly repair damage or address tenant concerns; refusing them entry because of a previous negative experience should be the right of the property owner. In any given instance, there may be a business reason that creates complications, so it should be at the owner's discretion to allow a new provider access.

As a rule, commercial property owners try very hard to accommodate the needs of existing and prospective tenants in a broad range of ways and arranging for broadband service from the tenant's preferred provider is largely a matter of course. In general, broadband infrastructure is being deployed inside commercial buildings, essentially on an as-needed, on-demand basis.

Currently, requests for access to commercial properties are handled thusly:

- Incumbent local exchange carriers obtain access to most commercial buildings as a matter of course and ILEC access is essentially ubiquitous. Some form of lifeline service is generally a prerequisite for a certificate of occupancy, which makes coordination with the ILEC a standard checklist item for any new construction project.
- As discussed above, competitive providers routinely get access if an existing or leased-up tenant makes a request. It's simply bad business for building owners to refuse the request of a current or potential customer.
- The local franchised cable operator will typically gain access to a building on request, because so many office tenants want cable service even if they obtain broadband from another provider. In many cities, cable operators did not construct plants in downtown business districts because their business plans were centered on residential customers. This is changing, and cable operators are essentially in the same position as competitive fiber providers. If, however, cable operators as a class are concerned about access to commercial properties, this is the most likely reason.
- Access to wireless service inside buildings, especially large office buildings, can be problematic for a variety of reasons. To provide this service as an amenity, many property owners have invested their own funds in designing and installing DASes, property-wide WiFi networks, small cell systems, booster systems, and other technical solutions that solve coverage and connectivity problems for tenants. In general, wireless carriers have concluded that they cannot afford the expense of building infrastructure inside commercial buildings. The result is that the market is forcing property owners to subsidize the construction of multiple wireless networks, even though they receive no revenue from the carriers.

Infrastructure deployment decisions are currently made by property owners and communications providers operating in a free market that encourages competition and benefits consumers. Furthermore, those decisions are producing the desired result: deployment of

infrastructure and competition. In fact, office building tenants typically have access to at least three or four broadband providers; in some buildings tenants can choose among as many as ten providers. A great deal depends on the size of the building and the number of potential competitive providers active in the local market.

Nevertheless, some in the communications industry have claimed that there are problems with the current system, suggesting that property owners see providers as a revenue source and their demands for fees are inhibiting deployment, and that competitive providers are at a disadvantage because they are unable to sell immediate access to services if they do not already have facilities in a building. The first claim is essentially untrue, and the second is fundamentally unfair.

When the typical provider brings a new circuit into a building to serve a new customer, the standard practice is for the customer to pay the provider's construction costs. If an owner charges the provider for access, that expense will almost always be passed on to the customer. While it is true that some property owners charge providers for the right to install their facilities in a building, these charges are generally modest, in the range of one or two hundred dollars a month in the Washington D.C. downtown market, for example. One California property owner charges a one-time fee of $500 to compensate the owner for the time their engineer spends to assess the technical viability of the additional provider and oversee the install; this is time that the engineer is not providing services to the building's other tenants. A building owner in Philadelphia requires a telecommunications provider to pay for the time of a security guard to make sure that both critical infrastructure and tenant space are protected during an install. A property owner is in the business of leasing space, and the provider is using space in the building. The tenant that requested the service is paying for space, as are all the other tenants. Assessing a fee helps cover the property owner's costs of having another entity in the building with its own demands and needs that the owner must attend to. Building access fees are not a profit center, and they are not unreasonable.

While it is a disadvantage for a provider to not have facilities in a particular building, it does not mean that forcing property owners to pay for infrastructure makes any business or legal sense. Instead, the FCC should order the existing providers in a building to split the cost for installing facilities to be used by future competitors. The FCC has jurisdiction over those entities, they are in direct competition with the future new entrants, and they are the ones with the market advantage. There is no logical rationale for forcing building owners to pay for such facilities, and in 47 U.S.C. § 259, Congress has already authorized the FCC to find ways for providers to share infrastructure costs.

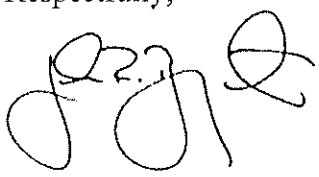
Service providers must weigh the cost of extending service against the potential return on that investment for each particular building. Such factors as the size, location, and age of the building, as well as the resident characteristics driving demand, are important considerations. Providers must also consider whether investing in a different property or in an entirely different locality would yield the same or greater profit. For their part, property owners are fully aware

that a building without access to broadband services can negatively affect the return on their investment and the value of the property.

Our free market system presumes that businesses determine their own respective needs and effectively negotiate agreements to meet those needs. Only if there is evidence of a market failure should government intervene. In this instance, Article 8 seeks to impose government regulation, even though service providers and tenants routinely request, and property owners routinely grant the necessary access. Article 8 would replace effective market mechanisms that benefit consumers and encourage broadband competition without any evidence of market failure or consideration of the practical implications. This is bad economics and bad policy.

BOMA's members are actively advancing the goals of the FCC and the BDAC through increased broadband access to our tenants because it is what is best for our businesses and the free market. We respectfully request that both bodies bear this in mind as they continue to consider and improve the MSC. A cooperative relationship that recognizes the mutual interests of all parties concerned will generate more progress in the long run than intrusive regulation. We would be happy to participate in such a dialogue and stand ready to provide any additional information.

Respectfully,



John R. Bryant
Vice President, Advocacy & Codes
BOMA International